

NO. 7:05-CR-67-FL-1
NO. 7:12-CV-241-FL

Respondent.

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

ORDER

This matter comes before the court on petitioner's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (DE # 34). On October 4, 2012, the government filed a motion to dismiss (DE #38), arguing that the petition was untimely filed and that petitioner had in plea agreement waived his right to challenge his conviction or sentence under 28 U.S.C. § 2255. However, on October 24, 2012, the government moved to withdraw its motion to dismiss, waived its previously asserted defenses, and recommending that the court re-sentence petitioner at the earliest possible opportunity without application of an armed career criminal enhancement. (DE # 40).

On March 20, 2006, pursuant to written plea agreement, petitioner pleaded guilty to felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924. The court sentenced petitioner on July 19, 2006, to a term of 180 months' imprisonment and a five-year period of supervised release. In determining petitioner's sentence, the court applied the Armed Career Criminal Act ("ACCA") career offender enhancement set forth in 18 U.S.C. § 924(e).

649 F.3d 237 (4th Cir. 2011) (en banc), petitioner is no longer eligible for the enhanced sentence contemplated under the ACCA. The government states that it would be appropriate for the probation office to recalculate petitioner's advisory guideline range in preparation for petitioner's resentencing.

In light of the government's waiver of defenses, the court GRANTS the government's motion to withdraw (DE #40), GRANTS petitioner's motion to vacate (DE#34), VACATES the judgment entered July 19, 2006, DIRECTS the clerk of court to schedule and notice a re-sentencing hearing for **Thursday, November 15, 2012, at 12:00 noon** at the United States Courthouse in New Bern, North Carolina, and DIRECTS the United States Probation Office to investigate, prepare, and publish to the appropriate parties a recalculation of petitioner's corrected advisory Guideline Range. The government will ensure petitioner's timely writ, transportation and housing for the re-sentencing hearing.

SO ORDERED, this the 29th day of October, 2012.

A handwritten signature in black ink, reading "Louise W. Flanagan". The signature is written in a cursive, flowing style.

LOUISE W. FLANAGAN
United States District Judge